Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allocated to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

CONSOLIDATED REPLY OF E.F. JOHNSON COMPANY

E.F. Johnson Company ("E.F. Johnson" or the "Company"), by its attorneys, pursuant to the provisions of Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") hereby submits its Consolidated Reply ("Reply") to the pleadings filed in response to its Petition for Reconsideration ("Petition") of the Third Report and Order in the above referenced proceeding.[1] The Company also takes the opportunity of this Reply to address the

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[1] Implementation of Sections 3(n) and 322 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 59 FR 59945 (1994) ("Third Report and Order").

Comments of Linear Modulation Technology Limited ("LMT") submitted in this proceeding on January 20, 1995.

I. BACKGROUND

E.F. Johnson has been an active participant in the Docket No. 93-252 proceeding since the inception of the proceeding. On December 21, 1994, it submitted a Petition for Reconsideration of the Third Report and Order adopted in the proceeding. The Company's Petition challenged the FCC's conclusion that all Commercial Mobile Radio Service ("CMRS") providers are "substantially similar". The Company's Petition was supported by the clear pronouncements of the Department of Justice ("DOJ"), which found that at least traditional specialized mobile radio ("SMR") services are a distinct product market.[2]

Four parties submitted pleadings responsive to the Company's Petition. The Personal Communications Industry Association ("PCIA") agreed with the Company's assessment and requested that the FCC reconsider its rules consistent with the Company's position. McCaw Cellular Communications, Inc. ("McCaw") and Nextel Communications, Inc. ("Nextel") challenged the timelines of the Company's request.

Four parties submitted pleadings responsive to the Company's Petition. All but the Opposition of Nextel Communications, Inc. were served by mail. Moreover, the Company has taken this opportunity of this Reply to respond to the comments of Linear Modulation Technology filed in this proceeding on January 20, 1995, which were not required to be served on the Company. Pursuant to the provisions of Sections 1.429 and 1.4 of the Commission's rules, a Reply may be submitted on February 2, 1995 to all but the Nextel Opposition. A Reply to the Nextel Opposition, because it was served by hand, would have otherwise been required by January 30, 1995. However, Nextel has consented to the submission of this Reply on February 2.

[2] U.S. v. Motorola, Inc. & Nextel Communications, Inc.; Proposed Final Judgment and Competitive Impact Statement, 59 FR 55705 (1994).

Motorola, Inc. ("Motorola") urged the Commission to disregard the objections allegedly contained in the Petition regarding the transaction between it, Nextel, Dial Page, Inc. and OneComm, Inc.[3] Finally, LMT, in its Comments, supported the Petition for Reconsideration submitted by SunCom Mobile and Data, Inc. ("SunCom") in this proceeding. E.F. Johnson is pleased to have the opportunity to submit this Reply to respond to the Nextel, McCaw and LMT pleadings.

II. REPLY

A. The Company's Petition Challenges Decisions in the Third Report and Order, not the Second Report and Order

Both Nextel and McCaw mischaracterize the Petition as an attack on the FCC's decision in the Second Report and Order in this decision. McCaw states that E.F. Johnson has asked the Commission to " adopt a narrower definition of [CMRS]. This issue is a subject of [the American Mobile Telecommunications Association's] pending petition for reconsider of the Second Report and Order in this docket, and should be addressed in that context."[4] Similarly, Nextel claims that E.F. Johnson's Petition "is a

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[3] Motorola alleges that E.F. Johnson, it its Petition, "inappropriately request[s] the FCC to entertain [its] objections to a transaction involving Motorola, Nextel, OneComm and Dial Page". Motorola Comments at p. 6. While it is true that the Company submitted Comments objecting to the proposed transfer of control of OneComm to Nextel, no such objection has been raised in the context of this proceeding. It is a completely erroneous allegation that E.F. Johnson used the Petition for Reconsideration to request Commission action concerning the Motorola, Nextel, OneComm and Dial Page transaction. Accordingly, pursuant to Section 1.41 of the Commission's Rules, E.F. Johnson requests that the Commission strike that portion of the Motorola Comments that contain these plainly incorrect assertions.

[4] McCaw Opposition at p.2 (citations omitted).

transparent attempt to once more contest the Commission's conclusion in the Second Report and Order that all interconnected SMRs should be classified as CMRS".[5]

Nextel and McCaw are wrong. The Company, did not contest the Commission's conclusion that all SMR providers are CMRS in its Petition (although this is a position the Company has, in fact, often asserted). The Company specifically challenged the Commission's findings that all CMRS are substantially similar.[6] Because the Company proved that all CMRS are not substantially similar, it urged that the Commission accord different regulatory treatment to mobile telephone like services and local SMR systems.

The Third Report and Order and subsequent Commission decisions make it clear that the determination that all CMRS are substantially similar is important, and distinct from the decision (albeit erroneous) that all interconnected SMR providers are CMRS. In the Third Report and Order, the Commission concluded:

> ...we begin in this Order with our conclusion that mobile services will be treated as substantially similar if they compete against each other...This in turn leads us to conclude that, to the extent practical, technical and operational rule should be comparable for virtually *all* existing and reclassified CMRS services. [emphasis in the original].[7]

Similarly, in the Further Notice of Proposed Rule Making in the Docket No. 93-144 proceeding[8], the Commission relied upon the conclusion that all CMRS were

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5 Nextel Opposition at p. 7.

6 "...the Commission must reevaluate its decision that all CMRS services are substantially similar". E.F. Petition at p. 6.

7 Third Report and Order at ¶ 14.

8 Amendment of Part 90 of the Commission's Rules to Facilitate Development of SMR Systems in the 800 MHz Frequency Band, P.R. Docket No. 93-144, Further Notice of Proposed Rule Making, Released November 4, 1994 (FCC 94-271) ("Further Notice").

substantially similar to propose a new licensing structure for 800 MHz SMR systems. It is true that the treatment of all interconnected SMR licensees as CMRS providers, established in the Second Report and Order in this proceeding, will result in unnecessary burdens on these entities. However, as is evident from the Third Report and Order and from the Further Notice of Proposed Rule Making in the Docket No. 93-144 proceeding, the Commission's incorrect conclusion that all CMRS are substantially similar has produced even more objectionable results. Accordingly, contrary to McCaw's and Nextel's assertions, the Company's Petition is both timely and relevant to the conclusions of the Third Report and Order.

B. Extension of the April 4, 1995 Construction Deadline Will Serve the Public Interest

E.F. Johnson strongly concurs with the Comments of LMT which support an extension in the current deadline for the construction of 220 MHz systems. Without such a request, the Commission will irreparably harm the nascent 220 MHz industry and seriously set back efforts to employ spectrum efficient narrowband technology on a widespread basis. Accordingly, as LMT requests, the FCC should extend until December 31, 1995, the time for construction of non-nationwide trunked 220 MHz systems in instances where the station licensee has demonstrated good faith and timely efforts toward construction of its system.

As LMT noted, through a licensing agreement with Securicor Group plc ("Securicor"), the Company currently manufactures 220 MHz equipment employing Linear Modulation ("LM") technology. The LM system, which was type accepted in

March, 1994, uses the latest digital processing and linear radio techniques to provide superior voice quality and currently, 9.6 kb/s high speed data in a 5 kHz channel. This technology, when proven successful through its use at 220 MHz, can be employed in other portions of the land mobile spectrum, where the Commission is currently evaluating methods by which it may "refarm" existing land mobile channels.

The successful early deployment of LM technology is, therefore, in the public interest, not only to meet current communications requirements, but also to provide a test site for a channelization scheme that may help meet land mobile communications requirements for decades to come. Without an extension of time, however, the 220 MHz industry in particular, and the use of 5 kHz technology in general will be jeopardized.

The Commission has imposed an April 4, 1995 deadline on the construction of all non-nationwide 220 MHz trunked systems. If those facilities are not constructed in a timely fashion, the Commission will likely recapture the authorizations and potentially relicense the spectrum through an auction procedure in the future. Because of the number of licenses that will likely be recaptured, the number of other auctions the Commission intends to conduct and scarce FCC resources, the Commission would not likely relicense 220 MHz spectrum for some time. By that point, two negative events will have occurred: 1) the existing 220 MHz industry, because of lack of spectrum for expansion, will have been irreparably harmed; and 2) the FCC will have lost the opportunity to meaningfully evaluate the use of 5 kHz technology, limiting its ability to use this efficient channelization scheme in any refarming procedure.

Regrettably, the retention of the April 4, 1995 deadline will produce precisely these results. E.F. Johnson has worked diligently to meet the many equipment orders it has received for 220 MHz equipment. However, the 220 MHz industry is unique because every local trunked system must be constructed by April 4. In the normal course, equipment manufacturers can meet customers' demands because every customer does not place an equipment order at the same time. In this case, virtually every 220 MHz licensee that has placed an equipment order must have that order satisfied between now and April 4. This compressed manufacturing and delivery schedule can simply not be met, even with the considerable resources the Company will commit to the process.

E.F. Johnson appreciates that licensees should not be permitted to warehouse spectrum nor avoid their construction requirements. Nevertheless, licensees that have attempted to meet those requirements should not be punished because of the unique circumstances involved in the 220 MHz industry. Accordingly, the Company agrees with LMT that the Commission should extend the construction requirement for 220 MHz non-nationwide trunked systems in those instances where the station licensee has demonstrated good faith and timely efforts toward construction of its system.

Extending the construction deadline will result in the provision of 220 MHz service to the public more quickly than if the Commission recaptures licenses for unconstructed stations and reissues the authorizations later. Equally as important, an interruption in the development of 5 kHz technology at this point will have serious

negative effects on the potential use of these systems in the future to meet the identified demands of the land mobile industry.

III. CONCLUSIONS

While in an earlier phase of this proceeding, the Commission erroneously concluded that all interconnected SMR licensees are CMRS providers, it is not that decision that the Company challenges here. Instead, E.F. Johnson, as evidenced by the DOJ, contests the FCC's finding that all CMRS are substantially similar. It is that conclusion which has resulted in the technical and operational changes of the Third Report and Order and the Commission's recent proposal in the Docket No. 93-144 proceeding.

E.F. Johnson also urges the Commission to adopt the LMT suggestion that the FCC extend the deadline for the construction of local 220 MHz stations for licensees that have demonstrated good faith and timely efforts toward construction of their systems. Without such an extension, the Commission will seriously inhibit the growth of the 220 MHz industry, which will be an important provider of mobile communications capacity, and a critical test bed for efficient 5 kHz technology.

WHEREFORE, THE PREMISES CONSIDERED, the E.F. Johnson Company supports the foregoing Reply and requests that the Federal Communications Commission act in a manner consistent with the views expressed herein.

Respectfully submitted,

E.F. Johnson Company

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Dated: February 2, 1995

CERTIFICATE OF SERVICE

I, Donna Fleming, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 2nd day of February, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing Reply to the following:

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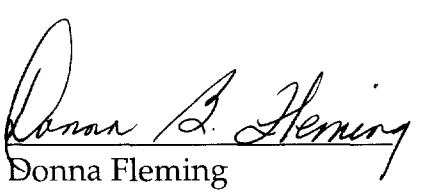

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